No. 76-726

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

EMPIRE GAS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondent contends that Congress has considered and rejected the position taken in our petition. Respondent relies for this proposition on the action of the Senate Judiciary Committee in striking a proposed Section 704 from S. 1284, the Hart-Scott Antitrust Bill. That contention is unfounded.

The proposed Section 704 (see Br. in Opp. 8) was substantially different from the standard we have proposed. Section 704 would have provided that "proof of a relevant market or of a dangerous probability of success in monopolizing any part of" commerce is irrelevant. That rule would have precluded consideration of the likelihood of monopolization in every attempt-to-monopolize the case, including cases in which the defendant's conduct is too ambiguous to justify a conclusion that the conduct is anticompetitive without an examination of the probable

effects of the defendant's actions in a particular market. The Department of Justice has never advocated an approach that failed to make this distinction; the Department did not support proposed Section 704 in the Hart-Scott Antitrust Bill.

Moreover, the Judiciary Committee's failure to include particular language in a particular bill does not justify any inference with respect to the views of the 94th Congress on the subject of attempt to monopolize; the proposal was stricken before the bill reached the floor.[1] Nor does the action of the Senate Judiciary Committee in 1976 demonstrate the intent of the Congress that enacted the Sherman Act in 1890.

2. Respondent seeks support for its position in the opinions of this Court. Our petition has discussed (pp. 9-10, 14-15) most of the cases upon which respondent relies. *American Tobacco Co.* v. *United States*, 328 U.S. 781, upon which respondent also relies (Br. in Opp. 10), is irrelevant. The Court did not discuss or approve the portion of the jury instruction reproduced by respondent; the Court had no reason to do so, because all attempt-to-monopolize questions had been resolved before the case reached this Court.

3. Respondent asserts that the fact that it did not succeed in monopolizing the LP gas business demonstrates that its conduct is not "socially undesirable" and should not be forbidden (Br. in Opp. 17-18). But the socially undesirable result is not only the completed monopolization but the anticompetitive steps, and the harm inflicted on competitors, on the path to monopolization.

Failure to restrain persons who have exhibited an unequivocal intent to achieve a forbidden goal, and who

[1]The Committee conceivably may have concluded that judicial clarification of existing law would make new legislation unnecessary.

have taken a substantial step toward achievement of that goal, inevitably exposes society to the risk that such persons will succeed in the future. It also exposes society to the risk that their efforts will produce harmful results even if they never achieve that which they seek. *Swift & Co.* v. *United States*, 196 U.S. 375, recognizes that the basic purpose of all attempt offenses is to impose restraints upon such dangerous persons before they succeed. The Court declared that acts which are not sufficient in and of themselves to produce a forbidden result may constitute an attempt, if the acts are performed with a specific intent to achieve the forbidden goal. 196 U.S. at 396.

The court of appeals concluded that the evidence in this record clearly establishes that respondent acted with a specific intent to achieve monopoly. Respondent has not cited any evidence tending to refute that conclusion.

If the decision below is allowed to stand, coercive conduct of the type described in this record, which can serve only to diminish competition, will be immune from restraint until the conduct brings some market to the brink of monopolization. The court of appeals has held that the Sherman Act, described by this Court as "a comprehensive charter of economic liberty,"[2] which was intended to prohibit all substantial restraints upon competition,[3] does not prohibit conduct that makes a substantial step toward monopolization. This ruling seriously weakens the efficacy of the Act in accomplishing its objective.

The record in this case is clear: respondent undertook anticompetitive and coercive acts with the specific intent to monopolize. Respondent has not been able to

[2]*Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4.

[3]*Standard Oil Co.* v. *United States*, 221 U.S. 1.

achieve its intended objective, but this fortuitous failure does not change the character of respondent's actions or make them any less dangerous.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.